IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 335 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILTON POLLACK,
Counsel for Petitioners.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

C. TABLE OF CASES

PAGES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed the judgment entered August 9, 1944, by the United States District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 6, 1945 (R. 69), after denial of a petition for rehearing (R. 68). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF FACTS.

This action was instituted in the United States District Court for the Southern District of New York by three residents of New York, on behalf of themselves and all other holders of Class B debentures issued by the defendant, to recover amounts due in lieu of interest on the debentures and payable out of earnings of the defendant, a Wisconsin railroad corporation. A specimen copy of the debentures is annexed to the complaint (R. 8), and portions thereof are quoted in the dissenting opinion of Circuit Judge Frank (R. 62).

The District Court denied defendant's motion to dismiss the complaint based on the claim by defendant that the Court had no jurisdiction over the person (R. 53) and held that the defendant was present and "doing business" within the State of New York (R. 48). At the same time, however, the District Court dismissed the complaint, without prejudice to the institution of a similar suit in Wisconsin, on the ground that "there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation" (R. 53). The Circuit Court affirmed, one judge dissenting.

The debentures had their inception as valid obligations in the State of New York and in the district in which this action was brought (R. 9, 27). The debentures are listed and traded in as bonds on the New York Stock Exchange (R. 47). They are transferable on the books of the defendant only in New York (R. 9). All amounts due on these debentures in lieu of interest are expressly made payable in New York (R. 9) and such amounts as were in fact paid by defendant were admittedly paid from New York (R. 18). The defendant maintains its financial as well as another office in New York (R. 18, 19) and maintains a bank account in New York, not only for the purpose of meeting obligations of the very character which the petitioners seek to

enforce in this action but also for its "excess of operating funds" not needed in Wisconsin (R. 19).

Five of defendant's six directors are to be found in New York and can not be found for service of process in Wisconsin (R. 29, 35). These directors include all executive and fiscal officers, other than the President who is the sixth director and actually operates the railroad from Wisconsin (R. 36). In New York are to be found two of the three members of defendant's Executive Committee, which is appointed from year to year and is authorized to act for the Board of Directors during intervals between meetings (R. 29, 35, 46).

Directors' meetings are customarily held in New York City, and defendant—though relying successfully thus far on the doctrine of *forum non conveniens*—admits that such meetings have been held in New York "for the convenience of Directors" (R. 19). In New York are kept defendant's financial records, its transfer books, its minutes of directors' meetings, its seal and other corporate records (R. 17, 18, 35).

Reports filed with the Securities and Exchange Commission by defendant are customarily signed and sealed in New York (R. 35) and the person authorized to receive notices from the Commission is stated to have a New York address (R. 34).

Finally, of the 30 largest stockholders of the defendant owning an aggregate of 20,633 shares of stock out of a total of 25,000 shares outstanding, all but four are listed in reports filed by defendant with the Interstate Commerce Commission as having New York addresses (R. 37).

The complaint in this action (R. 3-12) is framed on the theory that the debentures issued by the defendant constituted a contract between the company and debenture holders requiring the company to pay "in lieu of interest" certain described amounts out of annual net earnings, generally to be characterized as the free surplus after reserves set up by the company, and the liability to pay is unaffected by any

exercise of discretion on the part of the defendant or its board of directors (R. 4, 5). Defendant concedes that "the single cause of action alleged in the complaint" proceeds on a "construction of the provisions of the certificate of incorporation and the Class B Debentures of the defendant" as would require the defendant to pay the amounts claimed by plaintiffs "without the exercise of discretion by the directors" (R. 16). Plaintiffs have not joined the directors as parties to this action because under their construction of the contract and under the theory of their complaint in this action no relief is required as against them. The action taken by the directors in the past, such as setting aside out of annual earnings reserves for additions, general improvements and depreciation, is not disputed by the plaintiffs but is in fact adopted as a basis for their computation of the amounts now due them (R. 5). It is the free surplus remaining after such reserves which plaintiffs claim under their contract.

In their complaint, the plaintiffs allege that in each of the years 1924 to 1943 (excepting the years 1932, 1933 and 1934), the defendant had substantial net earnings in excess of the $155,000 required in each of said years to satisfy preferential payments due to holders of defendant's stock and Class A debentures, and that after additionally deducting amounts charged against earnings in each of such years for additions, general improvements and depreciation, the aggregate amount of such net earnings was $1,649,618.85 (R. 5, 11), of which amount the sum of $809,618.85 has been improperly withheld from the Class B debenture holders since 1924 and accumulated in defendant's surplus account (R. 6, 12). Judgment directing distribution of said sum pro rata among the Class B debenture holders is requested (R. 19).

Plaintiffs' position is that the language used in defendant's articles of incorporation and the debentures is such that the right granted to the Class B debenture holders is an absolute and unconditional contractual right "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per

cent upon the said Class A Debentures and the said stock." (R. 4). As Judge Frank expressed it in his dissenting opinion in the Court below, there is no "basis for any suggestion that the directors are given any discretion in fixing the amount to be paid" (R. 63).

Accordingly, plaintiffs' position is that (1) the "internal affairs" of the defendant corporation are not involved; and (2) assuming without conceding that they are so involved, a proper application of the doctrine of *forum non conveniens* does not justify declining jurisdiction in the forum selected by the plaintiffs.

QUESTIONS PRESENTED.

1. Does the cause of action set forth in the complaint involve interference with the "internal affairs" of a foreign corporation?

2. Assuming that interference with defendant's "internal affairs" is involved, was the doctrine of *forum non conveniens* properly invoked to decline jurisdiction of the suit in New York under the facts in this case, or was the forum selected by the plaintiffs an "appropriate forum" within the decision in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123?

REASONS FOR GRANTING THE WRIT.

1. An important question involving the exercise of jurisdiction by federal district courts is involved. More specifically there is involved here a question as to the extent to which and under what circumstances the doctrine of *forum non conveniens* may be invoked to defeat the jurisdiction of a federal district court sitting in a district in which the

corporation is present and doing business. Particularly, where the only forum within which personally to reach the directors with process is the district where suit was brought. The weight to be given to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, as a precedent appears to be the subject of considerable doubt among the judges in the lower federal courts. Though cited by the majority in the court below to sustain their decision, the *Rogers* case is similarly relied upon in the dissenting opinion. The District Judge cited the *Rogers* case in support of his decision dismissing the complaint. In *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, Judge Clark of the Second Circuit alluded to the fact that there were dissents by three of the judges of this Court in the *Rogers* case, and he suggested that on its facts that decision might no longer be followed. A similar statement was made by Judge Mahoney of the First Circuit in *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76.

2. The doctrine of *forum non conveniens*, a doctrine essentially rooted in principles of justice and convenience, has been so misapplied in this case as to evoke the comment in the dissenting opinion in the court below that "the doctrine applied here * * * might well be called '*forum inconveniens*'" (R. 65). Assuming the applicability of this doctrine to the facts of this case and accepting, *arguendo*, the reasoning of the majority in the court below to the effect that both the corporation and its directors are necessary parties, rejection of jurisdiction in the only district in which the directors are amenable to process results in a palpable denial of any competent forum and in manifest injustice to the plaintiffs in this action. To permit the decision of the court below to remain as a precedent can lead only to further confusion and possibly greater injustice.

3. The holding by the court below appears to be in conflict with the decisions of the New York courts, which have not hesitated to construe the charters and obligations of

foreign railroad corporations towards their preferred stockholders (*Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157; *Prouty* v. *Michigan S. & N. Indiana R.R. Co.*, 1 Hun 655), and to income bondholders (*Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163; *Day* v. *Ogdensburgh & Lake Champlain R.R. Co.*, 107 N. Y. 129).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: May 25th, 1945.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railway Company,

Petitioners.

By MILTON POLLACK,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The grounds upon which the jurisdiction of this Court is invoked, a statement of the facts involved and the questions presented appear in the accompanying petition and, for the sake of brevity, are not here repeated.

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals (R. 58-66) are reported in 147 F. (2d) 777. The opinion of the District Court (R. 48-51) is reported in 59 F. Supp. 98.

POINT I.

THE COURT BELOW ERRED IN HOLDING THAT INTERFERENCE WITH THE "INTERNAL AFFAIRS" OF A FOREIGN CORPORATION IS INVOLVED IN THIS SUIT.

The courts below have declined to exercise an admitted jurisdiction because they were of opinion that this suit involves interference with the "internal affairs" of a foreign corporation within the doctrine of *forum non conveniens*.

The district court apparently concluded that "internal affairs" were involved because, as it stated, "the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures" (R. 50). It did not stop to construe the contract sued upon. If thought that the plaintiffs' construction "necessarily involves the internal affairs of the defendant" (R. 50), though, as pointed out by Judge Frank in his dissenting opinion, "the contractual duty of the defendant depends solely on a mathematical computation easily made" (R. 65). Obviously, the mere fact that Wisconsin law might be involved did not justify the rejection of jurisdiction, for if that were true then whenever a question of conflict of laws arises a trial court could reject

jurisdiction. The New York courts have not hesitated to construe the charters and obligations of foreign railroad corporations in similar situations. (Cf. *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 176; *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, 178; *Day* v. *Ogdensburgh & Lake Champlain R. R. Co.*, 107 N. Y. 129, 141; *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1 Hun 655.) Nor would the fact that the Wisconsin courts had not passed upon the precise point be a ground for declining jurisdiction. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said at page 237:

> "Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Unlike the district court, the Circuit Court did construe the debentures. Differing, however, with the construction placed upon them in the complaint, the majority were of opinion that "before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them" (R. 61). But even they agreed that "jurisdiction ought not to have been declined" if plaintiffs' construction of the debentures was correct (R. 61).

The majority in the court below failed to discuss the provisions in the articles of incorporation and the debentures upon which plaintiffs rely and which Judge Frank quoted in arriving at a contrary conclusion (R. 62). These are the provisions in the articles of incorporation stating that the B debentures are "to be entitled to receive in lieu of interest

thereon any net earnings of the railroad and property in each year remaining after payment of five percent upon the said Class A Debentures and the said stock", and "any such net proceeds remaining after such payments *to be* distributed pro rata to and among the holders of the said Class B Debentures" (R. 4)*, and in the debentures themselves reading as follows:

> "Any surplus net earnings arising in such year which may then remain *shall* be paid to and distributed among the holders of Class B Debentures pro rata" (R. 9, 62).*

These debentures were first issued in 1896. While present-day financing may run along different patterns, that surely is no reason for refusing to give effect to the plain language used by the defendant in placing these securities on the market. Similar language has frequently been construed to require mandatory payments of earnings involving no discretion on the part of directors, and the courts have not hesitated to invoke well settled principles of contract law to permit a recovery in such cases.

> *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230;
> *Wood v. Lary*, 47 Hun 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338;
> *Burk v. Ottawa Gas & Electric Co.*, 87 Kans. 6, 123 P. 857.

The majority in the court below appear to have rested their holding upon the fact that the debentures, in addition to the foregoing provisions, also state that the amounts payable "*will* be fixed and declared by the Board of Directors" (R. 9)*. Obviously, the use of the declarative in this sentence does not weaken the preceding mandatory language. As pointed out by Judge Frank in his dissenting opinion, under such a provision a resolution by the directors would be purely min-

* Italics added.

isterial since the directors lack all discretion, and the obligation of the defendant to make payment of the amounts withheld is complete without any resolution (R. 64).

Since the contract sued upon contains an absolute and unqualified obligation on the part of the defendant to pay the amounts claimed in this suit—the accuracy of which amounts is undisputed—it seems clear to us, as it did to Judge Frank, that there is no interference with the "internal affairs" of the defendant and hence that there is no room for any application of the doctrine of *forum non conveniens*.

POINT II.

ASSUMING THAT THE DOCTRINE OF FORUM NON CONVENIENS HAS ANY APPLICATION, IT WAS AN ABUSE OF DISCRETION TO DECLINE JURISDICTION IN THIS CASE.

The district court, being of opinion that the "internal affairs" of defendant were involved, concluded that jurisdiction should be declined on two grounds, which it stated as follows (R. 51):

> "(1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin.
>
> "(2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant."

The undisputed facts in this record, summarized in the accompanying petition, are themselves the best answer to any claim that the defendant is being subjected to any undue burden by carrying on this litigation in New York. A place more convenient to the defendant than New York for the conduct of this litigation is hard to imagine.

Nor does it seem to us to be a proper application of the doctrine of *forum non conveniens* to decline jurisdiction because of the crowded calendars in the district chosen by plaintiffs. We do not believe that the condition of the calendar is a consideration determining the acceptance or rejection of jurisdiction. We understand the term "convenience" when used in connection with the doctrine of *forum non conveniens* to refer to the convenience of litigants rather than to the convenience of the court. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience."

In the court below the majority, proceeding on the assumption that the exercise of discretion by directors was involved, held that the district court did not abuse its discretion in declining jurisdiction and remitting the parties to that of Wisconsin, where, said the court, "both corporation and directors can be sued" (R. 62).

The assumption that the directors were amenable to process in Wisconsin finds no support in the record. The undisputed facts in this record indicate that the directors are to be found for service of process in New York, where five of defendant's six directors reside or have their places of business and where directors' meetings are—for the sake of their own convenience, as defendant itself states—customarily and regularly held (R. 19). If, as the court below has held, discretion is involved and corporate action by the directors is required, New York is the jurisdiction where the necessary parties are to be found. It seems manifest error then to invoke the doctrine of *forum non conveniens* to make it impossible for the plaintiffs to sue in the only district in which they can obtain jurisdiction over all necessary parties. Such a result moved Judge Frank in the court below to say in his dissenting opinion that the doctrine applied here by the majority might well be called "*forum inconveniens*" (R. 65).

Both the district court and the court below cited *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, in support of their rulings. But in the *Rogers* case this Court emphasized, in both the majority and minority opinions, that considerations of convenience and justice are paramount in the application of the doctrine of *forum non conveniens*. This Court there said:

> "But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case."

Although a very substantial interference with internal affairs was involved in the *Rogers* case, Chief Justice Stone and Justices Brandeis and Cardozo nevertheless dissented and were of opinion that on the facts presented jurisdiction should have been assumed. Since then, at least three federal court judges, including Judge Frank in his dissent in the court below (R. 64), have expressed doubts as to the weight to be given to the majority ruling in the *Rogers* case.*

The remaining two cases relied upon in the courts below are readily distinguishable. In *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, plaintiffs sought judgment requiring the corporation either to redeem its stock at par with interest or in the alternative to compel the defendant directors to declare a dividend allegedly withheld in bad faith, and thus the case involved a very real interference with internal affairs. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, the other case cited by the courts below, involved nullification of a corporate charter and such other extensive relief that Circuit Judge Clark was moved to say that he could "hardly imagine a more complete interference with the internal affairs of a foreign corporation."

---

* The other two are Judge Clark of the Second Circuit in *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, and Judge Mahoney of the First Circuit in *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76.

In the case at bar, no problem of administration is presented. The court is not asked to exercise its visitorial powers over a foreign corporation; it is not asked to interfere with the directors' discretion, for there is no discretion to be exercised. Nor is it an action in which a receiver is requested, or in which reclassification or redemption of stock or any similar far-reaching relief is sought.

There are present here no obstacles to the rendition of an effective decree. The federal court sitting in New York is in fact in a better position to enforce its decree than would be the branch of the federal court sitting in Wisconsin. The defendant has been found by the district court to be present in New York. With one exception, all of defendant's officers and directors are similarly to be found here. Its financial records are here. Funds for the purpose of meeting its obligations on these debentures are habitually kept here. What reasonable excuse can there be for permitting the defendant to escape the jurisdiction of the federal court in New York? Surely not the doctrine of *forum non conveniens*! That doctrine, as Mr. Justice Cardozo pointed out in the *Rogers* case, is "an instrument of justice" (p. 151). "The rule is intended to promote justice and not to furnish an avenue of escape for those who should answer somewhere for the wrongs charged against them" (*Overfield* v. *Pennroad Corporation*, 113 F. (2d) 6, 10).

We submit that every consideration of convenience, efficiency and justice points to New York, the forum selected by the plaintiffs, as the only "appropriate forum" within the holding in the *Rogers* case.

This Court in *Meredith* v. *Winter Haven*, 320 U. S. 228, indicated its concern with the failure of a federal district court to exercise its avowed diversity jurisdiction, in the absence of powerful considerations justifying non-exercise. It seems clear to us that the failure of the court in the case at bar to exercise its admitted jurisdiction was equally unjustified, and that such failure presents a situation requiring correction by this Court and the establishment of a salutary guide for the lower federal courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the accompanying petition for a writ of certiorari should be granted.

Dated: New York, May 25th, 1945.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

MILTON POLLACK,
LUDWIG MANDEL,
Of Counsel.